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IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE DECISION BELOW CONFLICTS WITH THE HOLDING OF *SURE-TAN* THAT THE NLRA DOES NOT PROVIDE FOR BACKPAY FOR WORKERS WHO, AS A MATTER OF LAW, WERE UNAVAILABLE FOR EMPLOYMENT IN THE UNITED STATES	6
A. The NLRB Disregarded the Important Congressional Policy of Deterring Unauthorized Immigration by Rewarding Undocumented Aliens for Entering the United States Illegally	6
B. *Sure-Tan*'s Holding Is Not Limited to Undocumented Aliens Who Have Departed the Country	9
II. AS A MATTER OF LAW, IRCA MAKES ALL UNDOCUMENTED ALIENS UNQUALIFIED TO WORK AND INELIGIBLE FOR BACK PAY	10
A. The Court of Appeals Erred by Deferring to the NLRB	10
B. IRCA Makes It Unlawful for an Employer to Hire an Undocumented Alien; Thus, It Bars the NLRB from Awarding Backpay to Undocumented Aliens	11

TABLE OF CONTENTS—Continued

Page

III. SECTION 10(c) OF THE NLRA PROHIBITS THE NLRB FROM IMPOSING PUNITIVE REMEDIES; THUS, UNDOCUMENTED ALIENS MAY NOT RECEIVE BACKPAY UNLESS THEY CAN SHOW THAT THEY WERE LAWFULLY ENTITLED TO BE PRESENT AND EMPLOYED IN THE UNITED STATES 15

IV. IN DEVISING REMEDIES, THE NLRA AND OTHER ANTI-DISCRIMINATION LAWS MUST BE CONSISTENT WITH IRCA 16

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES Page

Bevles Co. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986) 10

Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992) 14, 15, 16

Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999) 18

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 17

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 15

Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) 15

Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) 10

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) ..... *passim*

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 10

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. 18

Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. 18

Equal Pay Act, 29 U.S.C. § 206(d) 18

Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. 6, 7, 8, 10

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ..... *passim*

8 U.S.C. § 1324a 8

8 U.S.C. § 1324a(a)(1) 11

8 U.S.C. § 1324a(a)(1)(A) 11

8 U.S.C. § 1324a(a)(2) 12

8 U.S.C. § 1324a(b) 11

8 U.S.C. § 1324a(e)(4) 12

TABLE OF AUTHORITIES—Continued

	Page
8 U.S.C. § 1324a(e)(5)	11
8 U.S.C. § 1324a(f)(1)	12
8 U.S.C. § 1324a(h)(3)	11
8 U.S.C. § 1324b(a)(1)	17
8 U.S.C. § 1324b(a)(1)(B)	17
8 U.S.C. § 1324b(a)(6)	17
National Labor Relations Act, 29 U.S.C. § 151 *et seq.*	*passim*
29 U.S.C. § 160(c)	15
Section 503 of the Rehabilitation Act, 29 U.S.C. § 793	18
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*	17, 18

LEGISLATIVE HISTORY

H.R. Rep. No. 99-682, pt. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649	12, 13
H.R. Rep. No. 99-682, pt. 2 (1986)	13
S. Rep. No. 99-132 (1985)	11

MISCELLANEOUS

G. John Tysse, *The Immigration Reform and Control Act of 1986* (2d ed. 1988)	12
Memorandum from the NLRB General Counsel to Regional Directors *et al.*, 1988 NLRB GCM LEXIS 159, 1988 WL 236182 (Sept. 1, 1988)	9
U.S. Equal Employment Opportunity Commission, *EEOC Guidance on Remedies Available to Undocumented Workers*, EEOC Compl. Man. (BNA) N:3255 (Oct. 26, 1999)	18

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and LPA, Inc., respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges the Court to reverse the decision below and thus supports the position of Petitioner Hoffman Plastic Compounds, Inc. before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 350 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, Inc. (LPA) is a public policy advocacy organization representing corporate executives interested in human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion of current situations and emerging trends in labor and employment policy. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. LPA member companies have revenue exceeding $4.3 trillion annually.

All of EEAC's and LPA's member companies are employers subject to the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* In addition, all of EEAC's and LPA's members are subject to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). For these reasons, EEAC, LPA, and their members have an ongoing interest in any application of the federal anti-discrimination laws, including but not limited to the NLRA, to an undocumented alien who obtains employment by presenting his or her employer—without the employer's knowledge—with fraudulent immigration documents.

As such, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC and LPA represent: Whether an undocumented alien who—without his employer's knowledge—obtained employment by presenting his employer with fraudulent immigration documents, is entitled to backpay as compensation for a violation of the NLRA if the undocumented alien never was legally authorized to work in the United States during the backpay period.

EEAC and LPA thus have an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Furthermore, because of their significant experience in these matters, EEAC and LPA are uniquely situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

On January 31, 1989, Hoffman Plastic Compounds, Inc. (Hoffman) laid off several employees, including an employee known as "Jose Castro." Pet. App. at 5. The National Labor Relations Board (NLRB) later determined that Hoffman had violated the NLRA in laying off these employees and ordered Hoffman to offer reinstatement to each of the employees and to make them whole for any losses they had incurred. *Id.* Subsequently, the NLRB convened a compliance proceeding for the purposes of determining backpay. *Id.* There the employee known to Hoffman as "Jose Castro" testified that this was his true name. Pet. App. at 5-6. However, he then admitted that he was not a citizen of the United States and that he had obtained employment at Hoffman by presenting a borrowed birth certificate, an act made illegal by the immigration laws. *Id.*

In November 1993, an administrative law judge (ALJ) issued a decision regarding backpay for "Jose Castro." The ALJ determined that Castro was not entitled to either reinstatement or backpay because under *Sure-Tan, Inc. v.*

NLRB, 467 U.S. 883 (1984), backpay is tolled during any period when a discriminatee is not lawfully authorized to work in this country, and Castro never was lawfully authorized to work during the backpay period. Pet. App. at 6.

On September 23, 1998, a three-member NLRB panel reversed the ALJ's decision. Pet. App. at 6. The panel majority concluded that, notwithstanding the plain language of *Sure-Tan*, Castro was entitled to backpay from the date of his layoff until June 14, 1993, when Hoffman first learned that Castro used fraudulent identification to obtain employment. *Id.*

Hoffman subsequently filed a Petition for Review of the NLRB's decision with the U.S. Court of Appeals for the District of Columbia. The NLRB then filed a cross-application for the enforcement of its order. On March 17, 2000, the Court of Appeals rendered its initial decision. Pet. App. at 37. In a 2-1 decision, the Court of Appeals affirmed the NLRB's backpay award to Castro. *Id.*

Hoffman timely filed a Petition for Rehearing En Banc. The Court of Appeals granted that petition and vacated its earlier order. On January 16, 2001, in a 5-4 decision, the Court of Appeals narrowly affirmed the NLRB's backpay order to Castro even though Castro never was lawfully entitled to be employed in the United States during the backpay period. Pet. App. at 1. Hoffman petitioned this Court for a writ of *certiorari*, which was granted.

SUMMARY OF ARGUMENT

At a time when the federal immigration laws were silent as to the employment of undocumented workers, in *Sure-Tan*, the Court interpreted whether undocumented alien workers who have been discriminated against in violation of the NLRA are lawfully entitled to the remedy of backpay. The Court declared that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of

backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." 467 U.S. at 903.

In requiring employees to show that they were "lawfully available for employment during the backpay period," *id.* at 904, the Court said that the NLRB could not simply disregard the "equally important" Congressional policy underlying our immigration laws that unauthorized immigration is to be deterred. *Id.* at 903. The Court reasoned that to award undocumented aliens backpay when they are not lawfully available for employment would reward undocumented aliens for entering the United States illegally.

Since the Court decided *Sure-Tan*, Congress has expressly declared in the passage of IRCA that it is illegal—even criminal—to hire unauthorized aliens. *Sure-Tan* made clear that undocumented aliens are not entitled to backpay—irrespective of whether the undocumented alien has departed the country, and IRCA resolved any possible doubt as to whether undocumented aliens who are not lawfully available for employment can be awarded backpay. Clearly, they cannot.

IRCA's passage in 1986 was the product of a long process of information gathering and deliberation. In passing IRCA, Congress made difficult choices and drew careful lines to craft a cohesive immigration policy with significant impact on employers. IRCA reflects that Congress struck a delicate balance between the need to control illegal immigration and the need of aliens authorized to work in the United States to find gainful employment.

The Court of Appeals' decision in this case, which imposes upon an employer a punitive remedy not authorized by the NLRA, completely undermines the purpose and effect of IRCA. It distorts *Sure-Tan* to create a set of perverse incentives to undocumented aliens to remain in the United States and keep their unauthorized status concealed, by fraud if

necessary, for as long as possible so as to increase their potential monetary recovery under U.S. employment laws. The Court should reverse the Court of Appeals' ruling that illogically creates an entitlement to compensation for a job that the recipient was statutorily disqualified from holding in the United States.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE HOLDING OF *SURE-TAN* THAT THE NLRA DOES NOT PROVIDE FOR BACKPAY FOR WORKERS WHO, AS A MATTER OF LAW, WERE UNAVAILABLE FOR EMPLOYMENT IN THE UNITED STATES.

A. The NLRB Disregarded the Important Congressional Policy of Deterring Unauthorized Immigration by Rewarding Undocumented Aliens for Entering the United States Illegally.

Until IRCA's passage in 1986, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, was silent as to the employment of undocumented workers. Within this context, the courts were faced with interpreting whether the NLRA was intended to protect all workers regardless of immigration status and, if so, whether remedies would be available to all workers for violations of guaranteed statutory rights. The Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), contains two separate holdings. In reviewing these holdings, it is clear that while the NLRA applies to undocumented aliens, this application does not provide for reinstatement or backpay for any period when they were not lawfully entitled to be present and employed in the United States.

First, the Court in *Sure-Tan* ruled that the definition of "employee" under the NLRA included undocumented workers, 467 U.S. at 891-92, and that these workers could not be discriminated against because of their union activities. *Id.*

at 893-94. In coming to its first conclusion in *Sure-Tan*, the Court relied upon the NLRA's broad definition of the term "employee," as well as NLRB precedent holding that undocumented workers were employees within the meaning of the NLRA. *Id.* at 891. After finding that including undocumented workers within the coverage of the NLRA furthered goals of our national labor policy, the Court noted that it "[did] not find any conflict between application of the NLRA to undocumented aliens and the mandate of the [INA]." *Id.* at 892.

The Court noted that a "primary purpose in restricting immigration is to preserve jobs for American workers." *Id.* at 893 (citing § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14)). In addition, the Court was concerned that if undocumented aliens were not protected by the NLRA, they would have to accept low wages and poor working conditions that would compete with those of unionized American workers. *Id.* at 892. Enforcement of the NLRA on behalf of undocumented workers, the Court reasoned, would help to assure that the competition of undocumented alien workers would not adversely affect the wages and employment conditions of lawful residents. *Id.* As additional support for its holding that undocumented aliens are covered by the NLRA, the Court found that the INA was principally concerned with terms of admission to the United States, and not with employment. *Id.* The Court observed that Congress did not make it unlawful for an employer to hire undocumented aliens, nor did it create a separate criminal offense for an alien to accept employment without authorization. *Id.* at 892-93. Therefore, the Court found that coverage of undocumented workers under the NLRA would not conflict with the INA. *Id.* at 893.[2]

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[2] This conclusion strongly suggests that the Court would have been more reluctant to include aliens within the statutory meaning of "employee" if the INA had contained employer sanctions then, as it does

In its second holding in *Sure-Tan*, however, the Court curtailed available remedies for undocumented workers. In examining the remedies available to the undocumented discriminatees who had left the country, Justice O'Connor stated in the majority opinion for the Court that the appellate court's formulation of a six-month minimum backpay award without regard to the employees' actual losses or legal availability for work exceeded the court's limited authority under the NLRA. *Sure-Tan*, 467 U.S. at 898-99. The Court held that, just as the NLRB's reinstatement order was conditioned upon legal reentry of the employees into the country, the employees must also be deemed "unavailable" for work during any period when they were not lawfully entitled to be present and employed in the United States. *Id.* at 902-05.

In requiring employees to show that they were "lawfully available for employment during the backpay period," *Id.* at 904, the Court reasoned that the NLRB could not simply disregard the "equally important" Congressional policies underlying the INA—the objective of deterring unauthorized immigration. *Id.* at 903. Otherwise, undocumented aliens would be rewarded by the NLRB for entering the United States illegally. A broader interpretation of the Court's holding suggests that awarding remedial backpay to undocumented aliens might encourage unauthorized immigration by sending a message to potential undocumented alien workers that they will be protected by American labor laws and that working conditions in this country will therefore be more attractive.

In the present case, the NLRB, just as it did in *Sure-Tan*, disregarded the "equally important" Congressional policy of deterring unauthorized immigration by rewarding undocumented aliens for entering the United States illegally and keeping their unauthorized status concealed by fraudulent

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now after the enactment of IRCA. *See* 8 U.S.C. § 1324a (employer sanction provisions).

means that clearly contravene the central purposes of IRCA. In computing backpay, as the Court has already clearly spoken to the issue at hand in *Sure-Tan*, the Court of Appeals erred when it failed to conclude that "Jose Castro" was unavailable for work during any period he was not lawfully entitled to be present and employed in the United States.

B. *Sure-Tan*'s Holding is Not Limited to Undocumented Aliens Who Have Departed the Country.

The Court of Appeals erred in concluding that *Sure-Tan* prohibits backpay remedies only to undocumented aliens who depart the country. The Court's discussion in *Sure-Tan* was not so narrowly constrained. Instead, the holding sweeps more broadly and denies backpay not only to those illegal aliens who are not legally present in the United States, but also to those who, like "Jose Castro," are not legally entitled to be employed in the United States.[3] The Court of Appeals "simply cannot convincingly evade the High Court's clear statement that 'in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United

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[3] Indeed, following the *Sure-Tan* decision, the NLRB General Counsel instructed that any undocumented worker hired after IRCA's effective date (November 6, 1986), would not be entitled to backpay or reinstatement unless the employee could file a form I-9 with the employer evidencing lawful immigration status. Memorandum from the NLRB General Counsel to Regional Directors *et al.*, 1988 NLRB GCM LEXIS 159, at *2, 1988 WL 236182 (Sept. 1, 1988) (expressing opinion that the NLRB "has not acquiesced to the view of the Ninth Circuit that reinstatement and backpay are appropriate where the discriminatees are physically, albeit unlawfully, present in the U.S."). Thus, until some courts were able to invent purported loopholes in *Sure-Tan*'s clear holding, even its critics believed that *Sure-Tan* meant what it said.

States.'" Pet. App. at 36 (*Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 657 (D.C. Cir. 2001) (*en banc*) (Ginsburg, J., dissenting) (citing *Sure-Tan*, 467 U.S. at 903)).

Moreover, even assuming, *arguendo*, that such an interpretation was plausible before the enactment of IRCA, such an interpretation is no longer reasonable. Prior to the passage of IRCA, the employment of undocumented workers was "peripheral" to the INA. *See Sure-Tan*, 467 U.S. at 892-93 (expressly relying upon the fact that Congress had not made the employment of an alien a separate legal offense). However, since the passage of IRCA, courts can no longer rely on this line of reasoning in applying *Sure-Tan* only to those undocumented discriminatees who have left the country.

II. AS A MATTER OF LAW, IRCA MAKES ALL UNDOCUMENTED ALIENS UNQUALIFIED TO WORK AND INELIGIBLE FOR BACK PAY.

A. The Court of Appeals Erred by Deferring to the NLRB.

In the present case, the Court of Appeals erred by deferring to the judgment of the NLRB. Although the Court must uphold the NLRB's factual findings if they are supported by substantial evidence on the record as a whole, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951), here, the NLRB was not entitled to deference because it has no authority to interpret or apply the immigration laws. Thus, the NLRB's decisions regarding the immigration laws are entitled to no deference whatsoever. *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1393 n.3 (9th Cir. 1986).

Furthermore, the NLRB's discretion is limited by the principle that it must "accommodate" the objectives of statutory schemes other than those of the NLRA when making a remedial order. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 39 (1942). Thus, the accommodation doctrine precludes the NLRB from issuing an order that would contradict a valid

federal statute in another area of law, such as our country's immigrations laws. Here, the NLRB's reinstatement and backpay order regarding an undocumented alien who is not entitled to employment in the United States conflicts with IRCA and, therefore, must be reversed.

B. IRCA Makes It Unlawful for an Employer to Hire an Undocumented Alien; Thus, It Bars the NLRB from Awarding Backpay to Undocumented Aliens.

IRCA's primary purpose was to combat illegal immigration. S. Rep. No. 99-132, at 1 (1985). IRCA was intended to stem the flow of illegal immigration into the United States by eliminating the magnet of employment for undocumented workers. *Id.* To achieve this purpose, IRCA makes it unlawful for an employer knowingly to hire "unauthorized aliens." 8 U.S.C. § 1324a(a)(1)(A). An "unauthorized alien" is one who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by [applicable federal law] or by the Attorney General." 8 U.S.C. § 1324a(h)(3). Thus, IRCA effected a monumental change in our country's immigration policy by criminalizing the hiring of unauthorized aliens.

To ensure, therefore, that employers do not hire unauthorized aliens, IRCA mandates that employers verify the identity and eligibility to work of each new-hire by examining specified documents before they begin work. 8 U.S.C. § 1324a(b). Employers who fail to do so, whether or not that failure resulted in the hiring of an unauthorized alien, are subject to civil penalties. 8 U.S.C. § 1324a(e)(5). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. 8 U.S.C. § 1324a(a)(1). Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed,

the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C. § 1324a(a)(2). IRCA specifically states:

> It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an authorized alien with respect to such employment.

Id. Thus, IRCA statutorily disqualifies any undocumented alien from being employed as a matter of law.

Extensive study of the problem of illegal immigration indicates that the reason so many aliens come to the United States is the ease with which they can obtain employment. *See* H.R. Rep. No. 99-682, pt. 1, at 46-47 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650-51. Thus, one of IRCA's principal means of curtailing illegal immigration was the employer sanction provisions. *Id.* at 45, *reprinted in* 1986 U.S.C.C.A.N. at 5649-50. Employers who violate IRCA are punished not only by a series of civil fines, but are also subject to criminal penalties. These substantial sanctions for noncompliance may include: $250 to $2,000 per alien for the first offense; $2,000 to $5,000 per alien for a second offense; $3,000 to $10,000 for a third offense or more; and/or imprisonment for not more than six months for a pattern or practice of such violations. 8 U.S.C. §§ 1324a(e)(4); 1324a(f)(1).

IRCA's passage in 1986 was the product of a long process of information gathering and deliberation. *See* H.R. Rep. No. 99-682, pt. 1, at 51-56 (1986), *reprinted in* 1986 U.S.C.C.A.N at 5655-60. There was extensive debate and consideration on the issue of illegal immigration and its causes. *Id.* Civil rights organizations, concerned about potential discrimination against all "foreign looking or sounding persons," strongly opposed employer sanctions. G. John Tysse, *The Immigration Reform and Control Act of 1986* 2 (2d ed. 1988). Prior

decisions of this Court, *see* H.R. Rep. No. 99-682, pt. 1, at 69-70 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5673-74 (discussing *Examining Bd. v. Flores De Otero*, 426 U.S. 572 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973); and *In re Griffiths*, 413 U.S. 717 (1973)), also contributed heavily to the crafting of IRCA's final draft. Clearly, if Congress had wanted to "correct" the remedial holding of *Sure-Tan*, it would have done so expressly. Instead, the legislative history of IRCA demonstrates Congress' support of the Court's dual holding in *Sure-Tan*.

The House Judiciary Committee Report adopting the bill that eventually became enacted as IRCA states:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended [sic] to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in [*Sure-Tan*,] application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893.

H.R. Rep. No. 99-682, pt. 1, at 58 (1986), *reprinted* in 1986 U.S.C.C.A.N. at 5662. *See also* H.R. Rep. No. 99-682, pt. 2, at 8-9 (1986) (Report of House Education and Labor Committee).

Thus, the legislative history of IRCA endorses the first holding of *Sure-Tan*, that undocumented aliens are employees within the meaning of the NLRA. In addition, the Committee did not disapprove of the part of the *Sure-Tan* decision holding that undocumented aliens are not entitled to backpay for periods when they are not lawfully present and employed in the United States. Hence, it was the Committee's preference that existing law be preserved, including the remedial holding of *Sure-Tan*.

In *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), the Court of Appeals for the Seventh Circuit in addressing *Sure-Tan*'s holding post-IRCA, held that undocumented aliens who are discharged in violation of the NLRA are not entitled to reinstatement or backpay as a matter of law. *Id.* at 1119. In *Del Rey Tortilleria*, the Seventh Circuit's holding applied to discharges of undocumented aliens occurring before the enactment of IRCA. After analyzing the *Sure-Tan* opinion at length, the Seventh Circuit concluded that the plain language of *Sure-Tan* barred undocumented aliens from receiving backpay. *Id.* at 1121. In addressing the then recently-enacted IRCA, the Seventh Circuit stated:

> Section 274A of IRCA, 8 U.S.C. § 1324a(a), makes it unlawful for an employer to hire an undocumented alien; and thus, clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment.

Id. at 1122.

Given Congress' unequivocal declaration that it is illegal to hire unauthorized aliens and its mandate that employers immediately discharge unauthorized aliens upon discovering their undocumented status, this Court cannot uphold the determinations of the D.C. Circuit and NLRB majorities in this case. To do so would sanction the formation of a statutorily declared illegal relationship, expose Hoffman—and other similarly situated employers—to civil and criminal

penalties, and illogically create an entitlement despite an undocumented alien having been statutorily disqualified from employment in the United States. To uphold the ruling below would nullify an important policy of IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens.

III. SECTION 10(C) OF THE NLRA PROHIBITS THE NLRB FROM IMPOSING PUNITIVE REMEDIES; THUS, UNDOCUMENTED ALIENS MAY NOT RECEIVE BACKPAY UNLESS THEY CAN SHOW THAT THEY WERE LAWFULLY ENTITLED TO BE PRESENT AND EMPLOYED IN THE UNITED STATES.

Section 10(c) of the NLRA authorizes the NLRB to require a party in violation of the Act to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . ." 29 U.S.C. § 160(c). The backpay remedy under the Act is designed to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). However, in *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), the Supreme Court interpreted Section 10(c) of the NLRA as precluding the NLRB from imposing punitive remedies. The Court stated in *Republic Steel*: "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes." *Id.* at 10. For these reasons, any backpay award to undocumented aliens, who have no entitlement to employment in this country, is punitive and not remedial in nature.

As the Seventh Circuit noted in *Del Rey Tortilleria*, the unstated premise behind *Sure-Tan's* holding is that an undocumented alien has not been legally harmed by a lay-off or termination because he "has not been harmed in a legal sense by the deprivation of employment to which he had no

entitlement." 976 F.2d at 1119 (citing *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986) (Beezer, J., dissenting in part)). An award of backpay cannot be remedial when there is no legally cognizable harm to remedy. Thus, backpay in such circumstances can only be seen as punitive. While it may promote the purpose of the NLRA to guarantee collective bargaining rights to every employee, including undocumented aliens, the award provisions of the NLRA are remedial, not punitive, in nature. Because the NLRA prohibits punitive remedies, backpay cannot be granted to undocumented aliens who are not entitled to employment and, thus, have suffered no legal harm.

IV. IN DEVISING REMEDIES, THE NLRA AND OTHER ANTI-DISCRIMINATION LAWS MUST BE CONSISTENT WITH IRCA.

In passing IRCA, Congress made difficult choices and drew careful lines to craft a cohesive national immigration policy with significant impact on employers. IRCA reflects that Congress struck a delicate balance between the need to control illegal immigration and the need of aliens authorized to work in the United States to find gainful employment. The decision below completely undermines the purpose and effect of this legislation.

The Government contends, as the Court of Appeals held below, that denial of backpay awards to aliens unlawfully present and working in the United States would eliminate any incentive for an employer to obey the requirements of the NLRA, and thereby encourage unscrupulous employers to hire undocumented aliens. They also contend that undocumented alien employees are unlikely to petition for redress of labor law grievances due to lack of an effective remedy. The

Court expressly rejected such an argument in *Sure-Tan* by noting that its decision—

> leaves intact the cease and desist order imposed by the Board, . . . one of the Act's traditional remedies for discriminatory discharge cases. Were petitioners to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act.

467 U.S. at 904 n.13. The Court further noted that if there remains "[a]ny perceived deficiencies in the NLRA's existing remedial arsenal," the proper solutions lies with "Congress and not the courts." *Id.* at 904 & n.13.

Indeed, Congress did act when it passed IRCA, which can impose civil and criminal sanctions upon employers who knowingly employ undocumented aliens. In addition, to address concerns that the employer sanction provisions would cause discrimination against some national origin groups, IRCA prohibits employers that have from four to fourteen employees, and are therefore not covered by Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, from discriminating on the basis of national origin against U.S. citizens and nationals and non-citizens with work authorization. 8 U.S.C. § 1324b(a)(1). It also prohibits citizenship status discrimination and discriminatory documentary practices by all employers who have four or more employees. 8 U.S.C. § 1324b(a)(1)(B) and § 1324b(a)(6).

Moreover, an alien who has entered the country and obtained employment contrary to this country's immigration laws cannot complain when that employment is terminated since he or she had no legal right to that employment. Permitting backpay awards to such aliens has the effect of sanctioning the continuing violation of the law engendered by the undocumented alien's very presence in this country. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984). To do

so would illogically create an entitlement to a job despite having been statutorily disqualified from employment in the United States. Such a ruling would nullify IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens.

The Court should clarify that under IRCA, undocumented aliens are not entitled to backpay under the NLRA—or any of the other federal anti-discrimination laws, such as Title VII, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, the Equal Pay Act, 29 U.S.C. § 206(d), and Section 503 of the Rehabilitation Act, 29 U.S.C. § 793. Such clarification is necessary, because the U.S. Equal Employment Opportunity Commission (EEOC) has borrowed the faulty reasoning of the NLRB and has issued guidance stating that in cases where an employer is found to have discriminated against undocumented aliens in violation of these federal anti-discrimination laws, the workers are entitled to the same relief as other victims of discrimination. *See* U.S. Equal Employment Opportunity Commission, *EEOC Guidance on Remedies Available to Undocumented Workers*, EEOC Compl. Man. (BNA) N:3255 (Oct. 26, 1999). *Compare with Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (*en banc*) (per curiam) (in consideration of effect of IRCA on the scope of Title VII, finding all undocumented aliens "unqualified" to work as a matter of law), *cert. denied*, 525 U.S. 1142 (1999).

While the undocumented status of workers is never justification for violating the federal labor and employment laws, the social costs of rewarding undocumented alien workers who have violated the law is too great to allow these workers backpay. The Court should not close its eyes to this serious violation of our federal immigration laws. To do so would encourage their continued violation and actually create an incentive to seek to gain employment using illegal

documents—and a windfall for those undocumented aliens who manage to conceal that fact from their employers for as long as possible.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge that the judgment below be reversed with the direction that at no time was "Jose Castro" ever legally present in the United States or legally entitled to work in this country; accordingly, under *Sure-Tan*, Castro was entitled to no backpay.

Respectfully submitted,

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